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In the Supreme Court of the United States

October Term, 1982

JEWEL BURRUS,
Petitioner,

vs.

UNITED TELEPHONE COMPANY
OF KANSAS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the Respondent discriminated against the Petitioner in her employment on the basis of sex where Respondent relied upon subjective determinations to refuse to promote petitioner, the Respondent engaged in certain conduct in retaliation for petitioner's filing a complaint with the Equal Employment Opportunities Commission, and where the Petitioner presented statistical evidence strongly supporting her allegations that Respondent engaged in a pattern of discrimination.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this matter on July 22, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals of July 22, 1982 is reported at 683 F.2d 339 and is reprinted in the separate Appendix A to this Petition, pp. A1 to A10. The prior opinion of the United States District Court for the District of Kansas is not yet reported and is reprinted in the separate Appendix B to this Petition, pp. A11 to A20.

JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following Statutes:

42 U.S.C., Section 2000e-2 states in pertinent part as follows:

(a) It shall be an unlawful employment practice for an employer—

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

42 U.S.C., Section 2000e-3 states in pertinent part as follows:

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has opposed a practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C., Section 2000e-5 states in pertinent part as follows:

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in the unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

. . . .

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT

Petitioner is a female accountant who was employed with the Respondent from February 1970 through January 1976. Petitioner originally filed a complaint of sex discrimination in March 1973, claiming that Respondent had discriminated against her by failing to promote her. She later alleged that Respondent retaliated against her for filing the claim by discharging her in January 1976.

The U.S. District Court for the District of Kansas issued a Journal Entry of Judgment in favor of the Respondent on June 19, 1980. Appendix B at A11-A20. In its Memorandum and Order upon which the Journal Entry

was based, the Court made certain Findings of Fact, summarized as follows:

Petitioner is a female accountant. Respondent employed her between February, 1970, and January, 1976. United Systems Services, Inc. employed Petitioner between June, 1968, and February, 1970. Respondent and United Systems Services, Inc. are wholly-owned subsidiaries of United Telecommunications, Inc., a holding company. During her tenure with respondent, petitioner advanced from a Job Grade 9 to a Job Grade 12. Although she did not receive her accounting degree until 1972, petitioner's job title with respondent throughout her employment was "accountant." Respondent did not promote petitioner during the term of her employment with respondent. Prior to her employment with United Systems Services, Inc., petitioner worked for the American Telephone and Telegraph Company between 1948 and 1968. During the last five years of her time with A.T. & T., petitioner served as an Accounting Supervisor. While with A.T. & T., however, petitioner never had occasion to supervise anyone who possessed an accounting degree. Petitioner acquired her Bachelor of Science in Business Administration, with a major in Accounting, in 1972. While still in the employ of Respondent, petitioner took certain coursework toward a Master of Arts degree.

Petitioner's cause of action is premised upon the allegations that Respondent failed to promote petitioner and took certain retaliatory actions against petitioner due to the fact that respondent actively pursued a policy of sex discrimination in employment. Petitioner was specifically disgruntled by the fact that certain of her male contemporaries were promoted to supervisory positions within the respondent's company. Petitioner complains that she was as well qualified as the males in question, that she

had made known her desire for promotion, and that respondent not only refused to promote petitioner, but also closed out the available positions by appointing males to them.

In consequence of the allegedly discriminatory decisions of respondent in promoting certain males to supervisory positions, petitioner filed a charge of sex discrimination in March, 1973 with the Equal Employment Opportunity Commission and the Kansas Commission on Civil Rights. Petitioner claims that as a result of having filed the charge in question, respondent retaliated against petitioner by among other things, further restricting her growth opportunities and generally conspiring to drive her out of the firm. Respondent's failure to promote petitioner, as well as its alleged retaliation against her for the EEOC-KCCR claim, form the basis of this action.

The court found as a matter of fact that the ability to get along and communicate with one's peers, subordinates and superiors is a crucial consideration in the determination of whether a person is suitable for promotion to a supervisory position in nearly any business setting, and specifically in the context of petitioner's employment with respondent. The court found that there is no evidence either documentary or testimonial, which would tend to establish that petitioner possesses this critical quality.

The evidence in this case indicated that petitioner may have been technically as well qualified as some of her male counterparts who were promoted. The Court found, however, that she was not as technically qualified as two of the males about whom she had complained and suggested that petitioner was indeed ill-qualified for promotion to a supervisory position, in that she lacked the interpersonal skills necessary for such an advancement. The Court found that petitioner remained unpromoted be-

cause she was uncommunicative and unable to work effectively with others.

A substantial amount of testimony adduced at the trial of this case involved statistical evidence prepared by an expert witness for the Petitioner. The witness worked from data limited to Pay Grades 8 through Pay Grade 19; Petitioner began her work with the company as Pay Grade 8, and level 19 appeared to be the highest to which she could have advanced. Petitioner's counsel compiled information from the years 1973 through 1976 into a pattern as set up in Petitioner's exhibit. Counsel also requested from the counsel for the Respondent any further information to complete that compiled by the Petitioner. The records provided to Petitioner by the Respondent enabled the Petitioner to identify the department for each employee, the pay grade, the actual pay, the sex, and the specific job title.

Petitioner's expert then performed four or five different types of statistical procedures and techniques in making up his final report, which is in the record as Petitioner's Exhibit 75. In arriving at the final form of Exhibit 75, the expert ran approximately forty (40) tests and totals. One of the tests consisted of a comparison of the average salaries of males and females in each of the various pay grades used by the Respondent. One of the analyses made by the expert witness showed that in six of the eight grades in which both male and female employees were employed by the Respondent, that average female's salary was less than the average male's salary. It also showed that females were concentrated in the lower grades whereas males were concentrated in the upper grades. The expert further testified that in five out of seven groups, male employees received higher salaries;

in one of the remaining groups there was no male, and in the other, there was no female. The expert witness also performed something called a "Key Test" to compare the mean salaries of the male and female employees. The result that he obtained he considered to be statistically significant, with a total probability of .001. This means that the large difference in the salaries could occur in the absence of some sex bias or systematic bias with respect to the sexes only one time in one thousand. The statistics further showed that, if the range of salaries for accountants were 0 to 1000, the average female accountant at Grade 12 would be making $283.00 and the average male accountant at the same grade $463.00. The chances of such a large discrepancy in salary ranges could occur without bias between the sexes was also determined to be only 1 out of 1000. The expert concluded his testimony by pointing out that the number of people used to make his statistical analysis was sufficient to form a valid statistical conclusion and to assure that the calculations were reliable. All of the data that the expert used was complied from documents produced by the Respondent and from information provided by the Respondent to assist the Petitioner in examining and interpreting the documents reviewed.

The opinions of both Courts below were based upon their findings that the Respondent offered legitimate nondiscriminatory reasons for its failure to promote Petitioner and further that Petitioner's statistical data was defective and therefore entitled to no weight or consideration.

The District Court ruled in favor of the Respondent, and the Court of Appeals affirmed without oral argument. Appendix A1-A10 and A11-A20.

REASONS FOR GRANTING THE WRIT

1. Certiorari should be granted to resolve conflicts in principle among the Courts of Appeals and to decide an important question of federal law which should be settled by this Court.

Title VII of this Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., affords protection to members of certain groups against discrimination in employment based upon their membership in those particular groups. Section 2000e-2(a) states as follows:

It shall be an unlawful employment practice for an employer—

> (1) To fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or natural origin . . . .

The Courts recognize that employment decisions will usually and legitimately be cased upon a determination by the employer as to the best qualified applicant, and where a member of a protected class is the best qualified applicant, then that person is entitled to favorable action by the employer. *Cooper v. Allen*, 493 F.2d 765 (5th Cir. 1974).

One real danger that the Civil Rights Act is intended to prevent is the excessive use of purely subjective criteria by the employer to make employment decisions and to determine qualifications. Although an employer has every right to establish qualifications of its employees for ad-

vancement, the employer may not utilize wholly subjective standards to judge its employees, qualifications and then defend an attack upon its promotional process by pleading a lack of qualifications. *Crawford v. Western Electric Company, Inc.*, 614 F.2d 1300 (5th Cir. 1980).

Although the *Crawford* case was based upon discrimination due to race rather than sex, its theory is applicable to this case. In *Crawford*, promotions depended upon the applicants' performing work in the higher levels and in being "qualified" for the higher levels. The qualifications, however, were based upon the supervisors' evaluation of the workers, and the evidence showed that the supervisors had no written instructions for the ratings, no way for the employer to determine whether the supervisors were using standardized criteria, no reasons that had to be given for an unfavorable rating, no permanent written records of the quality of work done by each worker, and assignment of the workers based partially on what the supervisors perceived to be the skills of the employee. The Court of Appeals of the Fifth Circuit had no problem in finding such a format to be discriminatory, and Petitioner alleges that the same result should follow in this case.

Further evidence in the record in this case indicates that the Respondent did not post notices of job openings above a certain grade level in its employment structure. The Petitioner learned of several promotions and job transfers only after the Respondent posted a notice congratulating or announcing the new job of the person promoted or transferred. Furthermore Petitioner indicated that neither her supervisors nor any other employee of the Respondent advised Petitioner of job openings for which she was denied promotion and for which she filed a charge of discrimination. Moreover, the Respondent

did not establish any form of procedure for an employee to apply for a promotion or advancement, and the supervisors at various levels of employment with the Respondent had the discretion either to advise or not to advise the persons under them that certain promotion opportunities or jobs were available.

Such a persistent failure and refusal to announce job openings above a certain level, coupled with the discretionary power of the supervisors to refer requests for promotion to the proper persons, are detrimental factors to promotion opportunities. *Senter v. General Motors*, 532 F.2d 511 (6th Cir. 1976); *Rowe v. General Motors*, 457 F.2d 348 (5th Cir. 1976). See also *Myers v. Gilman Paper Corporation*, 392 F.Supp. 413 (S.D. Ga. 1975), *affirmed in part and reversed in part on other grounds*, 544 F.2d 837, *cert. denied*, 434 U.S. 801. The effect of this discretion is evident from the record showing that several of the Petitioner's supervisors indicated they would or did refuse to mention her name for promotion, or that they would express opposition to her promotion had her name ever been submitted.

In *Robinson v. Union Carbide Corp.*, 538 F.2d 652 (5th Cir. 1976), *modified on other grounds*, 544 F.2d 1258, *cert. denied*, 434 U.S. 522, the employees alleged discrimination based upon race in the area of promotions. The employer based promotion decisions upon questionnaires and evaluations from supervisors, but those questionnaires sought the supervisor's opinions regarding the candidates' "adaptability, hearing, demeanor, manner, verbal expression, appearance, maturity, drive, and social behavior," *Id.* at 662. The Court of Appeals found such subjective criteria used in promotion decisions to be an obvious violation of Title VII. In this case the Respondent alleged that its refusal to promote Petitioner was due solely to her

personal and social relationship with others, clearly the type of subjective evaluation that the court rejected in *Robinson*.

Also of interest is *Baxter v. Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033. In *Baxter* the court noted that the supervisors who recommended employees for promotion had no objective job descriptions to aid or guide them. In addition, the lack of notice of job openings available and the qualifications desired for promotion made black employees totally dependent upon their white superiors for promotion. The Fifth Circuit found such a situation to be patently illegal under Title VII. Inasmuch as the same general situation existed here for Petitioner, the lower courts should have made the same finding that the system the Respondent here used was patently in violation of Title VII.

The District Court apparently agreed with the Respondent's allegations that the Petitioner lacked a basic qualification—the ability to communicate effectively with others. The evidence does not show any factual basis for such a finding, however, and in fact the various job assignments that Petitioner had required entensive contact and communication with her home office and with numerous outlying field offices. Her successful performance of that job itself repudiates Respondent's contentions. Furthermore those qualifications are of a highly subjective nature and thus subject to abuse as discussed above. The evidence also showed that Respondent assigned Petitioner to a job position that had no description, thus indicating an attempt by Respondent to shunt petitioner aside and prepare its case against her.

Petitioner also alleged that Respondent engaged in retaliatory conduct after Petitioner filed her charge of

discrimination. Neither court below found in her favor on her claim in contravention of favorable rulings from courts in other circuits and in the face of sworn testimony by a superior of Petitioner that the Respondent was "leaving [Petitioner] where she was and building a case against her." The Eighth Circuit has ruled that an employer violates the Civil Rights Act, 42 U.S.C. § 2000e-3, if retaliation plays *any* part in adverse action; petitioner need not show that retaliation was the sole reason for adverse action. *Slotkin v. Human Development Corporation of Metropolitan St. Louis*, 454 F.Supp. 250 (E.D. Mo. 1978). Furthermore, the timing of certain adverse action against the Petitioner including the failure to award a pay increase, an attempted layoff, and an annual review by someone well above her immediate supervisor clearly supports her charge of retaliation. The failure of the lower courts in this case to agree directly conflicted with cases from other circuits. *Sherkow v. Wisconsin Department of Public Instruction*, 24 E.P.D. ¶31194 (7th Cir. 1980), *EEOC v. Pacific Press Publishing Association*, 21 E.P.D. ¶30522 (N.D. Cal. 1979). The lower courts here also ignored the clear intent of Respondent to build a poor record against Petitioner, contrary to the holding in *Mead v. United States Fidelity and Guaranty Company*, 442 F.Supp. 114 (D. Minn. 1977), *petition for writ of mandamus denied*, 585 F.2d 820 (8th Cir. 1978), *cert denied*, 440 U.S. 913.

Finally Petitioner also contends that the lower courts ruled in conflict with other circuits regarding the statistical evidence adduced by Petitioner. The District Court ruled that the number of persons involved constituted too small a statistical base for the evidence to be probative, and the Court of Appeals supported that decision with practically no comment. These rulings totally ignored and discredited the unopposed testimony of Petitioner's statistical expert regarding the validity of the results despite

the size of the universe used. The Courts also were contrary to the notion expressed in *Davis v. Califano*, 21 E.P.D. ¶30363 (D.C. Cir. 1979) where the Court of Appeals found that statistics could themselves establish a prima facie case, even with respect to an individual claim. The courts below were also in conflict with the Fifth Circuit, which found statistics to be valid when based upon a field of only five employees in *Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895 (5th Cir. 1978). The theory in the *Payne* case was that the impact of an employment practice is not on the number of positions to be filled but rather on the number of persons excluded.

In conclusion the rulings of the lower courts in this case are clearly in direct conflict with rulings in similar situations from various other circuits. The continued importance of the discrimination laws and the increased impact of computers and their statistical powers make this question an important one that merits consideration by this court.

2. The Tenth Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

In their decisions in favor of Respondent and against Petitioner, the lower courts in this case have ruled contrary to decisions of this Court in similar matters, in particular *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *International Brotherhood of Teamsters v. United States*, 421 U.S. 324 (1977), and *Furnco Construction Corporation v. Waters*, 438 U.S. 567 (1978). This Court should consider this case consequently in order to rectify the conflict between the lower courts and this Court.

The Court of Appeals properly concluded that *Burdine, supra,* allows an employer to exercise discretion when choosing among applicants who meet any objective qualifications. It improperly concluded, however, that Respondent has not used subjective analysis in its exclusion of Petitioner from promotions she sought. The record below clearly establishes that Respondent continued to apply purely subjective considerations in its refusal to promote petitioner. Thus Respondent was in violation of Title VII, and petitioner should have reclined judgment in her favor.

With respect to petitioner's claim of illegal retaliation, she contends that the lower courts failed to heed the direction set out in *Burdine* and in *Furnco, supra.* These cases and others have established that the Respondent must produce evidence that would dispel the inference of retaliation by establishing the existence of a legitimate reason for the employment action taken. The courts below erred in their focus only on the discharge of Petitioner without giving any attention to the continuing problems faced by petitioner from the initial filing of her EEOC complaint until her ultimate termination. Petitioner clearly established that the discharge was a pretext for discrimination, but the courts below ruled against her despite the clear mandates of *Furnco* and *Burdine.*

Finally the failure of the courts below to accord any weight at all to petitioner's statistical evidence is contrary to this Court's directive from *International Brotherhood of Teamsters v. United States,* 421 U.S. 324 (1977). In footnote 20 of that case, at page 339, this Court emphasized the importance of statistical evidence. Even a small universe can provide invaluable statistical evidence where the statistics show a great disparity in treatment and where there is other strong evidence in this case clearly estab-

lished an enormous dispartiy in treatment and reflected that the situation as found could result only once in one thousand times without discrimination. The refusal of the lower courts to consider such a disparity obviously violates the prior decisions of this Court and requires this Court's further attention.

CONCLUSION

The explicit conflict among the various circuits as to the various issues raised by the Petitioner as well as the conflict of the Tenth Circuit Court of Appeals decision with prior decisions of this Court provide ample justification for the granting of this petition for a writ of certiorari. I therefore suggest that certiorari should be granted in this case.

Respectfully submitted,

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